

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS)
47809, 47822, 47830, 47840, 48422,)
48423, 48424, 48465, 48466, 48467,)
48468, 48470, 48471, 48647, 48665,)
48666, 48667, 48668, 48669, 48672,)
48673, 48767, 48825, 48827, 48828,)
48865 AND 48866 FILED TO CHANGE THE)
PLACE OF USE OF WATERS HERETOFORE)
DECREED AND SET FORTH IN THE)
TRUCKEE RIVER AND CARSON RIVER)
DECREES.)

RULING

GENERAL

I.

The twenty-seven (27) applications to change the place of use of decreed rights under the Truckee River and Carson River decrees¹ are the subject matter of this ruling and are set forth in the record.² The applications represent requests to change the place of use of decreed water on irrigated lands within the Newlands Reclamation Project under the provisions set forth in the Orr Ditch and Alpine decrees.³

¹ Final Decree in United States v. Orr Water Ditch Co., et al., Equity A-3 (D. Nev. 1944), hereinafter referred to as Orr Ditch; and Final Decree in United States v. Alpine Land & Reservoir Co., et al., Equity No. D-183 BRT (D. Nev. 1980), hereinafter referred to as Alpine.

² State of Nevada Exhibits No. 11 and 12, public administrative hearing before the State Engineer, June 24th, 1985.

³ Orr Ditch Final Decree, p. 88. Alpine Final Decree, pp. 161-162.

II.

Application 47830 was timely protested⁴ by the Pyramid Lake Paiute Tribe of Indians on the following grounds:

"Comes now The Pyramid Lake Paiute Tribe of Indians whose post office address is P.O. Box 256, Nixon, Nevada 89424 whose occupation is a federally recognized Tribe of Indians, the governing body of the Pyramid Lake Indian Reservation, organized pursuant to the Indian Reorganization Act of 1934, with a Constitution and By-laws approved by the Secretary of the Interior, and protests the granting of Application Number 47830 filed on March 15, 1984 by Les Johnson to change the place of use of the waters of Carson and Truckee Rivers situated in Washoe, Storey, Lyon, Churchill and Humboldt Counties, State of Nevada for the following reasons and on the following grounds, to wit:

1. Pursuant to the federal reclamation law, 43 U.S.C. §389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake

⁴ In both Orr Ditch and Alpine, the procedures are set forth for accomplishing changes in point of diversion, and place, means, manner or purpose of use. See Footnote 3. The applications and protests have been subject to provisions set forth under the Nevada Water Law, specifically those provisions of Nevada Revised Statutes, Chapter 533. The applications were published in a newspaper of general circulation in the Counties of Churchill, Lyon and Washoe as required by NRS 533.360. NRS 533.365 provides that an interested person may file verified protests to an application within 30 days from the date of last publication of the notice of application. See State of Nevada Exhibit 8, public administrative hearing before the State Engineer, February 4th and 5th, 1985. See also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983): "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." (Emphasis added).

Paiute Tribe of Indians; (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery; and (v) the Truckee-Carson Irrigation District, and, on information and belief, the applicant has not complied and are not in compliance with the rules and regulations of the Secretary of the Interior applicable to the Newlands Project and approval of said application would encourage further violations of those rules and regulations.

3. The approval of said application by the Secretary of the Interior would violate the Order, Judgment and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), specifically Section D(4) of the Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (OCAP), in that: (i) the Truckee-Carson Irrigation District is not in compliance with said OCAP; and (ii) on information and belief, the applicant who is seeking permission to change the use of water within the Newlands Reclamation Project is not in compliance with Sections C(1), C(3), and/or C(5) of said OCAP and/or with the provisions of the decrees in United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944), and United States v. Alpine Land & Reservoir Co., Equity No. D-183 BRT (D. Nev. 1980).

4. Granting or approving the above referenced application by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicant does not have a vested right to use the waters of the Truckee River on the proposed places of use described in his application.

5. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

6. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the OCAP; and (iii) it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the application be Denied and that an order be entered for such relief as the State Engineer deems just and proper." (Emphasis in original).

With the exception of Applications 47822 and 47830, the applications were timely protested⁴ by the Pyramid Lake Paiute Tribe of Indians on the following grounds:

"Comes now The Pyramid Lake Paiute Tribe of Indians whose post office address is P.O. Box 256, Nixon, Nevada 89424 whose occupation is a federally recognized Tribe of Indians, the governing body of the Pyramid Lake Indian Reservation, organized pursuant to the Indian Reorganization Act of 1934, with a Constitution and By-laws approved by the Secretary of the Interior, and protests the granting of Application Number [47809, 47840, 48422, 48423, 48424, 48465, 48466, 48467, 48468, 48470, 48471, 48647, 48665, 48666, 48667, 48668, 48669, 48672, 48673, 48767, 48825, 48827, 48828, 48865 and 48866] filed...to change the place of use of the waters of Carson and Truckee Rivers situated in Washoe, Storey, Lyon, Churchill and Humboldt Counties, State of Nevada for the following reasons and on the following grounds, to wit:

1. Pursuant to the federal reclamation law, 43 U.S.C. §389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake

fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery; and (v) the Truckee-Carson Irrigation District, and, on information and belief, the applicant has not complied and are not in compliance with the rules and regulations of the Secretary of the Interior applicable to the Newlands Project and approval of said application would encourage further violations of those rules and regulations.

3. The approval of said application by the Secretary of the Interior would violate the Order, Judgment and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), specifically Section D(4) of the Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (OCAP), in that: (i) the Truckee-Carson Irrigation District is not in compliance with said OCAP; and (ii) on information and belief, the applicant who is seeking permission to change the use of water within the Newlands Reclamation Project is not in compliance with Sections C(1), C(3), and/or C(5) of said OCAP and/or with the provisions of the decrees in United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944), and United States v. Alpine Land & Reservoir Co., Equity No. D-183 BRT (D. Nev. 1980).

4. Granting or approving the above referenced application by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicant does not have a vested right to use the waters of the Truckee River on the proposed places of use described in this application.

5. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

6. On information and belief, said application involves the transfer of alleged water rights that were never perfected in accordance with federal and state law. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

8. On information and belief, the applicant is not the true and proper owner of the alleged water rights that are the subject of the transfer application. The requested transfer should not be considered or granted unless and until the applicant provides satisfactory documentation of his, her, or their ownership of the land and water rights that are the subject of the application.

9. On information and belief, the water rights title records maintained by the Truckee-Carson Irrigation District are not accurate or reliable and those records do not provide a satisfactory basis for documenting or establishing the existence of Project water rights. The requested transfer should not be considered or granted unless and until the Truckee-Carson Irrigation District documents the existence, amount, location and ownership of all water rights within the Newlands Reclamation Project to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior. Alternatively, the requested transfer should not be considered or granted unless and until the existence, amount, location and ownership of the water rights that are the subject of this application are established and documented to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior.

10. On information and belief, said application should be denied because it would increase the consumptive use of water with the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

11. On information and belief, said application involves the proposed transfer of alleged water rights from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

12. On information and belief, the applicant has been applying water to some or all of the lands that are the subject of this application in violation of both

state and federal law. By using water on the subject lands before applying for or obtaining a transfer from the Nevada State Engineer, the applicant is in violation of Nevada law and cannot obtain an approved transfer from the State Engineer.

13. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the OCAP; and (iii) it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the application be Denied and that an order be entered for such relief as the State Engineer deems just and proper." (Emphasis in original).

III.

The United States Department of the Interior petitioned the State Engineer to intervene as an unaligned party in interest.⁵ Intervention was granted on the grounds that there were federal interests in these proceedings that justify standing as a party in interest.⁶

IV.

A public administrative hearing in the matter of the subject applications to change was held before the State Engineer on June 24, 1985, in Fallon, Nevada. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties who had standing in this matter.⁷ All parties concluded by submitting

⁵ See Interior Exhibit 1, public administrative hearing before the State Engineer, November 26th through 29th, 1984.

⁶ United States v. Alpine Land & Reservoir Co., supra at 858. See also transcript of public administrative hearing before the State Engineer, Vol. I., pp. 6-14, November 26th through 29th, 1984.

⁷ Transcript of the public administrative hearing available as public record in the Office of the State Engineer, Carson City, Nevada.

post hearing briefs setting forth their respective positions. The parties stipulated to incorporating the record of previous hearings held on November 26th through 29th, 1984, and February 4th through 5th, 1985, before the State Engineer on other change applications into the record of evidence in this matter.⁸ Exhibits, therefore, have been identified in consecutive order for the purpose of record continuity.

FINDINGS OF FACT

I.

In addressing change applications, both Orr Ditch and Alpine cases and decrees specifically set forth the procedure to accomplish changes in the point of diversion, manner, purpose and place of use.

Orr Ditch provides that:⁹

"Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree."
(Emphasis added).¹⁰

⁸ Transcript of public administrative hearing before the State Engineer, February 4th, 1985, Vol. I, p. 12, and June 24, 1985, Vol. I, p. 11.

⁹ Orr Ditch Final Decree, p. 88.

¹⁰ Recently the Court interpreted this controlling provision: "This Court has interpreted 'in manner provided by law' to mean in accordance with Nevada state procedures for allowing changes.: Final Order Granting the State of Nevada's Motion for Summary Judgment on the Issue of the United States' Application for Changes In Use and Changes In Purpose dated February 28, 1984, United States v. Orr Ditch Water Co. et al., Equity A-3-2-WEC (D. Nev.). In accord, Memorandum Decision and Order dated June 26, 1940, United States v. Orr Ditch Water Co. et al., Equity A-3 (D. Nev.) (Raffetto Decision).

Similarly, Alpine provides:¹¹

"Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this court." (Emphasis added)

The State Engineer finds that the change applications that are the subject matter herein are properly before him for consideration and decision.

II.

It is clear upon review of Alpine and Orr Ditch that the State Engineer, in considering applications to change, is guided by whether the applications would "tend to impair the value of existing rights or be otherwise detrimental to the public welfare".¹² The question of availability of unappropriated water is not at issue. In accordance with the position affirmed by the 9th Circuit,¹³ the applications seek only to change water already appropriated under determined rights.

III.

Water duty was addressed at length in Alpine.¹⁴ The Court rejected the contention that contracts executed by Interior and the land owners within Newlands were binding as to duty of water. The Court, 697 F.2d at 853, further found that:

"The right to the use of water acquired under the provisions of this act [Reclamation Act of 1902, 43 U.S.C. §372 (1976)] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (Emphasis added).

The Court's additional findings are significant and binding on these proceedings since, in general, it is undisputed by the record that beneficial use under the change applications has historically occurred on lands described and set forth under the

¹¹ United States v. Alpine Land & Reservoir Co., supra at 857-858. Alpine Final Decree, pp. 161-162.

¹² United States v. Alpine Land & Reservoir Co., supra at 858; NRS 533.370(3).

¹³ United States v. Alpine Land & Reservoir Co., supra at 857.

¹⁴ United States v. Alpine Land & Reservoir Co., supra at 853-857.

proposed places of use within the project boundaries.¹⁵ Additionally, the record indicates that some or most of the existing places of use include canals, ditches, laterals, drains, yards, roads¹⁶ and areas to be subdivided to provide community growth which have been rezoned to residential development.¹⁷ The record indicates, however, the drains were not in existence until after 1926¹⁸ and many of the ditches, laterals and roads were changed or added after the project was begun and after the contracts were consummated.¹⁹

The proposed places of use include areas of interspersed land within irrigated areas where hills or mounds have been leveled and gullies filled in or otherwise irrigated by utilizing modern irrigation equipment.²⁰ The Court was more concerned with present day irrigation practices and specifically stated in Alpine, 697 F.2d at 853:

"The issue we review is whether the District Court reached a correct determination of beneficial use as of 1980." (Emphasis added).

697 F.2d at 856:

"In the circumstances, it is clear the District Court did not err in giving the contracts and the Nevada statute relied on by the United States little evidentiary significance."

¹⁵ Interior's Exhibit 10, Transcript of public administrative hearing June 24, 1985, testimony of Barry Alan Fitzpatrick, Vol. I, p. 82; other references throughout the hearing transcript of November 26th through 29th, 1984, and February 4th through 5th, 1985, firmly establishes the beneficial use of water on the proposed places of use.

¹⁶ Protestants Exhibits 43, 44 and 45, and testimony of Ali Shahroody, public administrative hearing, June 24th, 1985, Vol. II, p. 48.

¹⁷ Testimony of Barry Allan Fitzpatrick, public administrative hearing, June 24th, 1985, Vol. I, pp. 85-87.

¹⁸ Testimony of Doris Morin, public administrative hearing, February 4th and 5th, 1985, Vol. I., pp. 67-83; testimony of Barry Allan Fitzpatrick, Vol. II, p. 337.

¹⁹ Testimony of Doris Morin, public administrative hearing February 4th and 5th, 1985, Vol. I, p. 85.

²⁰ Testimony of Barry Allan Fitzpatrick, public administrative hearing, June 24th, 1985, Vol. I, p. 82.

Although these findings were in the context of addressing water duty, they are compelling in influencing the State Engineer's determination as to the validity of the historical beneficial use on the land represented in the record.

Notwithstanding the foregoing, the protestant seeks to disqualify the change applications on the basis of noncompliance with Nevada Water Law. The record, however, demonstrates that the United States was fully aware of the irrigation practices of the Newlands farmers and, until recently if not encouraged, allowed continued irrigation of lands described under the proposed places of use.²¹ The record provides no evidence that enforcement of the contracts has ever been consistently maintained.

IV.

The record documents the historic and actual beneficial use as of 1980. Beneficial use for a number of years has been accomplished by application of water to lands described under the proposed places of use. As the Court noted in Alpine,²² there was no evidence of enforcement of the contracts and historically no distinction was made between land owners with and without the limiting contracts. Both Orr Ditch²³ and Alpine²⁴ set forth the limit and extent to which the project is entitled to water and the finality of these decrees has been confirmed by the United States Supreme Court.²⁵ The lands under the proposed places of use are entitled to a duty of water consistent with a determination as to their appropriate classification as bench or bottom lands and nothing more.

21 Protestant's Exhibits 2, 3, 4; Interior's Exhibit 3 and 4; and Applicant's Exhibits B, F, G, W, and DD, public administrative hearing before the State Engineer, November 26th through 29th, 1984, February 4th through 5th, 1985, and June 24th, 1985. Testimony of Gordon Lyford indicates that all of the lands under the proposed places of use have been classified preliminarily as irrigable, Vol. I, p. 90.

22 United States v. Alpine Land & Reservoir Co., supra at 856.

23 Orr Ditch Final Decree Claim #3 and #4, pp. 10 and 11.

24 Alpine Final Decree, pp. 151, 152.

25 Nevada vs. United States, 103 S. Ct. 2906 (1984); United States v. Alpine Land & Reservoir Co., supra, cert. denied 104 S. Ct. 193 (1983).

V.

The protestants documented the record with substantial evidence and testimony as to the precarious nature of the habitat of the Lahontan cutthroat trout and cui-ui sucker, classified respectively as threatened and endangered species in the lower reaches of the Truckee River.²⁶ The record also reflects that man's activities in the lower reaches has resulted in additional impediments to the natural spawning habits of these species.²⁷ The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species, however, there is no evidence that the Newland's right set forth under Orr Ditch has ever been or would be exceeded if the change applications were approved. Orr Ditch is binding²⁸ on all parties thereto and the Truckee-Carson Irrigation District is entitled to a diversion through the Truckee Canal, storage and comingling with the waters of the Carson River in Lahontan Reservoir for the irrigation of lands within the Newlands Project. Upon careful review of the record, the State Engineer can find no conclusive or compelling evidence that approval of the change applications would constitute an injury to the existing rights of the protestant or any other existing rights set forth in the subject decrees. To the contrary, the record can be relied on as substantial and conclusive evidence that the changes will not detrimentally effect or impair protestant's existing rights simply based on the historical beneficial use.

VI.

Only Application 47822 seeks to change a portion of 252.35 acre-feet from the Truckee division to the Carson division. More specifically, the application seeks the right to change 41.21 acres from what the Bureau classifies as Truckee division bench land to a mixture of Carson division bench and bottom land.²⁹ Nonetheless, the water requirement by the Bureau's classification for the existing place of use is 310.84 acre-feet and the

²⁶ Protestant's Exhibits 6, 7 and transcript of public administrative hearing before the State Engineer, November 26th through 29th, 1984, testimony of Chester Buchanan, Vol. II, pp. 101-208, and testimony of Alan Ruger, Vol. II, pp. 193-223.

²⁷ Testimony of Chester Buchanan, Vol. II, pp. 136-139, transcript of public administrative hearing before the State Engineer, November 26th through 29th, 1984.

²⁸ Nevada vs. United States, supra at 2920-2925.

²⁹ Interior's Exhibit 8, public administrative hearing before the State Engineer, June 24, 1985. Application 47822 was not under protest but is addressed here because of the change from the Truckee division to the Carson division.

proposed place of use is 298.50 acre-feet.²⁹ By TCID's classification, the water requirement for the existing place of use is 295.30 acre-feet and for the proposed place of use is 252.35 acre-feet,³⁰ which is what is sought in the application.

There was no evidence as to the effects of the change proposed under Application 47822 on project water demand and the State Engineer can draw no distinction between this application and Application 47831 to which evidence and testimony showed that over the 80 year period of record, there would be less demand on project water if the application were approved.³¹ There is no evidence that the approval of this application would exceed the Newlands entitlement under Orr Ditch or impair any other rights. Testimony and evidence as to irrigation efficiencies within the two divisions was received into the record.³² The relevancy of efficiencies to this matter is questionable but in the context of any possible element of waste or unreasonable use represented by the proposed changes, the State Engineer will enter a finding.

Protestants attempt to demonstrate³³ an additional burden on the TCID Truckee River diversions based on information contained in a flow chart from a 1971 report. Applicants effectively discredit the validity of this evidence on the basis of the absence of hard data and reliance on assumption, the reasonableness of which is questionable.³⁴ The State Engineer finds that the evidence of protestant does not sufficiently and accurately reflect current irrigation practices within the project. The evidence on these subject applications would indicate that the cumulative total in acre-foot duty on the proposed places of use exceeds the total on the existing places

³⁰ Applicant's Exhibit DD, public administrative hearing before the State Engineer, June 24, 1985.

³¹ Interior's Exhibit 7, public administrative hearing before the State Engineer, February 4th and 5th, 1985, and testimony of Robert Whitney, Vol. I, pp. 142-144.

³² Testimony of Ali Shahroody, public administrative hearing before the State Engineer, November 26th through 29th, 1984, Vol. II, pp. 235-254, and February 4th and 5th, 1985, Vol. II, p. 227; testimony of Roderick L. Hall, pp. 522-589; Applicant's Exhibits L-1, L-2, J, K; Protestant's Exhibit 9.

³³ Protestant's Exhibits 9, 10, public administrative hearing before the State Engineer. Testimony of Ali Shahroody, November 26th through 29th, 1984, Vol. II, pp. 236-244.

³⁴ Transcript Vol. II, November 26th through 29th, 1984, pp. 242-244; pp. 250-266 testimony of Ali Shahroody, public administrative hearing before the State Engineer.

of use.³⁵ However, as in the past, the State Engineer has limited each application to either the acre-foot duty of the existing place of use or the acre-foot duty of the proposed place of use, which ever is lesser. When this criterion is applied to the subject applications, the cumulative total on the proposed places of use becomes less than the existing places of use.

VII.

With the exception of Application 47822 and 47830, the protests to all of the applications included a claim that the water rights were never perfected in accordance with federal and state law, or have been abandoned or forfeited. The existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902. No state law governed how the water was to be used nor was there any statutory provision for loss of water by abandonment or forfeiture.³⁶ Both the Alpine and Orr Ditch decrees recognize the Newlands rights as having a priority of 1902 and Alpine specifically recognized existing uses as late as 1980 and that these rights did exist in their entirety.³⁷

The record of evidence indicates that the water has been used continuously by project farmers. The fact that individual project farmers were not using the water on the exact acreage for which they contracted on an acre-for-acre accounting was addressed and disposed of in Alpine.³⁸

The Nevada Supreme Court, in Manse Spring, provides authoritative guidance on the basic and fundamental distinctions between abandonment and statutory forfeiture as well as establishing precedent for criteria to be considered in making findings on loss of water rights.³⁹

³⁵ Applicant's Exhibits DD, public administrative hearing before the State Engineer, June 24th, 1985.

³⁶ NRS Chapter 533 was adopted in 1913 and, as it pertains to forfeiture and abandonment, NRS 533.060 in 1913 with amendments in 1917, 1949, and later.

³⁷ Orr Ditch and Alpine, supra, (See Footnote 1); Nevada v. United States, 463 U.S. 110 (1983).

³⁸ United States v. Alpine Land & Reservoir Co., supra at 853, 856. Testimony of Doris Morin, public administrative hearing before the State Engineer, June 24, 1985, pp. 71-73. Testimony of Barry Alan Fitzpatrick, public administrative hearing before the State Engineer, June 24, 1980, pp. 91-98; Interior's Exhibit 10; and Applicants Exhibit "EE".

³⁹ In re Manse Springs and Its Tributaries, 60 Nev. 280, 286-287, 389, 290, 108 P.2d 311 (1940). See also, NRS 533.085(1).

The court has clearly held that abandonment is a voluntary matter, the relinquishment of the right by the owner with the intention of forsaking and deserting it. Forfeiture, on the other hand, is the involuntary or forced loss of the right caused by failure of the holder of appropriation to utilize the resource as required by statute.

Both the relinquishment of possession and the intent are essential to a finding of abandonment and are well defined and set in case law of the Western States.⁴⁰ The State Engineer finds no disparity or confusion in definition. Mere non-use of the water to which an appropriator is entitled under valid rights without substantial and conclusive evidence of intent to abandon and relinquish possession is not sufficient for a finding of abandonment.

Based on this record of evidence, the State Engineer can make no finding that there was either intent to abandon nor intent to forsake the water or the right to use it.

⁴⁰ McFarland v. Alaska Perseverance Min. Co., 3 Alaska 308, 337 (1907).
Gila Water Co. v. Green, 29 Arizona 304, 306, 241 Pac. 307 (1925).
Wood v. Etiwanda Water Co., 147 Cal. 228, 234, 81 Pac. 512 (1905).
Beaver Brook Res. and Canal Co. v. St. Vrain Res. and Fish Co., 6 Colo. App. 130, 136, 40 Pac. 1066 (1985).
Hawaiian Commercial and Sugar Co. v. Wailuka Sugar Co., 15 Haw. 675, 691 (1904).
Union Grain and Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 223, 240 Pac. 443 (1925).
Atchison v. Peterson, 1 Mont. 561, 565 (1872), affirmed 87 U.S. 507 (1874).
State v. Nielsen, 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956).
In re Manse Spring and its Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 P.2d 311 (1940).
Borman v. Blackmon, 60 Oreg. 304, 308, 118 Pac. 848 (1911).
Edgemont Improvement Co. v. N.S. Tubbs Sheep Co., 22 S. Dak. 142, 145, 115 N.W. 1130 (1908).
Anson v. Arnett, 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.).
Desert Live Stock Co. v. Hooppiania, 66 Utah 25, 32, 239 Pac. 479 (1925).
Sander v. Bull, 76 Wash. 1, 6, 135 Pac. 489 (1913).
Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 400, 100 P.2d 124, 102 P.2d 745 (1940).
Valcalda v. Silver Peak Mines, 86 Fed. 90, 95 (9th Cir. 1898).
Franktown v. Marlette, 77 Nev. 354 Ped 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786 P.2d 262 (1979).

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and subject matter of this action.⁴¹

II.

The Orr Ditch and Alpine decrees set forth the procedure and authority in the matter of applications to change the point of diversion, manner, purpose or place of use of decreed waters of the Carson and Truckee Rivers.

III.

The record of evidence is substantial and conclusive as to the historical uses of the water under the subject applications to change.

IV.

The record of evidence establishes the duty of water to which the lands under the proposed changes are entitled.

V.

There is no conclusive evidence that the approval of the applications to change in this matter will effect or impair the value of other existing rights set forth under the subject decrees.

VI.

There is no conclusive evidence that the approval of the applications to change in this matter will be detrimental to the public interest or welfare.

VII.

The record in this proceeding provides no substantial or conclusive evidence to support a conclusion that the rights set forth herein have been abandoned or forfeited.

⁴¹ NRS Chapter 533; See Footnote 3.

RULING

The protests to the granting of applications to change 47809, 47830, 47840, 48422, 48423, 48424, 48465, 48466, 48467, 48468, 48470, 48471, 48647, 48665, 48666, 48667, 48668, 48669, 48672, 48673, 48767, 48825, 48827, 48828, 48865 and 48866 are herewith overruled and Applications 47809, 47822, 47830, 47840, 48422, 48423, 48424, 48465, 48466, 48467, 48468, 48470, 48471, 48647, 48665, 48666, 48667, 48668, 48669, 48672, 48673, 48767, 48825, 48827, 48828, 48865 and 48866 will be approved subject to existing rights on the sources and subject to water duties affirmed or modified by the Federal Water Master.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 30th day of
September, 1985.